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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JORGE ANDERSON, Plaintiff and Appellant, v. SEAFOOD CITY et al., Defendants and Respondents.	B263925 (Los Angeles County Super. Ct. No. BC517561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed with directions.

Litigation & Advocacy Group and Glenn A. Murphy for Plaintiff and Appellant.

Kaufman Dolowich & Voluck, Elizabeth Williams and Vincent S. Green for Defendants and Respondents.

Jorge Anderson[1] (Anderson) appeals from the trial court's dismissal of his lawsuit alleging disability discrimination and from the denial of his motion to tax costs. We affirm.

BACKGROUND

On August 7, 2013, Anderson filed a complaint alleging that Fortune Foods, Incorporated, doing business as Seafood City (Seafood City), violated the Unruh Civil Rights Act, Civil Code section 51 et. seq. (CRA), and the California Disabled Persons Act, Civil Code section 54 et seq. (DPA), when Seafood City denied him and his service dog access to its supermarket. Anderson alleged that he "is a disabled veteran of the United States Air Force who uses an assistance animal to manage his disability." In October 2011 he entered a Seafood City supermarket in Los Angeles to purchase items, "but was refused accommodations, threatened and forced to leave Defendants' business establishments due to Plaintiff's disability and assistance animal." On each occasion, Anderson tried to explain that his dog was not a pet but a service dog. "On one occasion, upon entering the market Plaintiff was approached by the Defendants' employees and agents and told that he would have to leave and that he would not be provided the services offered to the general public (namely the ability to shop for food and other items) because Plaintiff was accompanied by

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[1] The judgment misspells plaintiff's surname as Andersen, but the correct spelling is Anderson.

his assistance animal. This discrimination was in direct violation of the Unruh Civil Rights Act (Cal. Civ. Code, § 51)." When he tried to explain that his dog was a service animal, store employees "began intimidating Plaintiff with threats of physical violence" to prevent him from entering and to force him to leave. Although he was not required to have his service dog tagged or licensed as a service dog, his dog was so licensed by the State of California. Anderson requested preliminary and permanent injunctions, statutory damages and civil penalties, attorney fees, and exemplary damages under the CRA, and a money judgment consisting of damages up to three times the amount of actual damages, as well as attorney fees and costs, under the DPA.

Seafood City filed an answer on September 16, 2013, denying all the allegations. Among its affirmative defenses, Seafood City alleged that Anderson could not establish that he was denied access on any particular occasion or that he suffered any actual damage as a result of any action of Seafood City, that Anderson could not recover exemplary damages, and that his "purported dog was not a qualified service animal as defined by California law."

In a March 21, 2014 response to interrogatories, Anderson confirmed that he sought "damages for emotional distress and humiliation, including physical manifestations thereon." At Anderson's deposition on August 19, 2014, he testified that a doctor had diagnosed him with a disability of "PTSD, TBI, military sexual trauma." He claimed a posttraumatic stress injury and a traumatic brain injury,

and confirmed that he had suffered military sexual trauma. Anderson's attorney noted that the claims made in the complaint of emotional distress were "as it pertains to the actual events and the emotional stress that he's suffered due to the discrimination against him." Anderson testified that the encounter at Seafood City upset him, caused PTSD, caused him to lose sleep and to stop eating for a few days, and affected his sleeping for a few weeks. Anderson had become "a bit reclusive," and when asked if he continued to suffer from any type of emotional distress from the incidents, he stated, "It causes apprehension [¶] . . . [¶] that's a big part of it." Anderson's counsel submitted an expert witness declaration stating that licensed clinical psychologist Dr. Judy Ho would "testify to the use and benefits of service dogs to individuals with disabilities, the emotional distress and psychological trauma suffered by plaintiff as a result of the actions of Defendants and the emotional distress that is unavoidable in discrimination matters." Trial was set for January 7, 2015.

After initially denying without prejudice Seafood City's motion to compel a mental examination of Anderson, the trial court granted a renewed motion to compel after a hearing on December 3, 2014 in which Anderson's counsel participated by phone. The order stated that good cause for the exam existed because "Plaintiff has placed his mental condition in issue by claiming emotional distress and humiliation as a result of the incidents pled in the Complaint in October 2011, due to the deposition testimony

that discloses that Mr. Anderson suffered or suffers from PTSD, TBI, or Military Sexual Trauma . . . and due to the disputed issue of Plaintiff's need for or the effect of the service dog used. Defendants are entitled to determine whether the claimed injuries claimed as damages are influenced by or caused by a reason other than as claimed in the complaint or if Plaintiff requires the service animal." The testing was also necessary to "determine whether Plaintiff has suffered any continuing mental distress and humiliation as a result of the incident."

The court ordered Anderson to appear for an examination with Dr. Carl F. Hoppe at 10:30 a.m. on December 10, 2014, and with Dr. Maria T. Lymberis within 10 days of the December 3 hearing, at a date to be determined at a meet and confer. Dr. Hoppe's testing was necessary to assist Dr. Lymberis in her examination of Anderson. "Specific inquiry regarding sexual history shall be limited to that which is related to the traumas that cause or caused PTSD, TBI and/or military sexual trauma." The testing "shall not be recorded by audio or video equipment." "Issue/evidence sanctions, per §2032.410 are premature and will be determined in the event Plaintiff wil[l]fully fails to comply with the court's order." Counsel for Anderson stated at the hearing that he and Anderson were engaged in a jury trial and hoped to be finished in time for the December 10 appointment.

Dr. Hoppe waited for Anderson from 10:30 a.m. to 11:45 a.m. on December 10, but he did not appear. Seafood

City filed an ex parte application for sanctions against Anderson and his attorney. A declaration by Seafood City's counsel stated that Anderson's counsel called him on December 9 to say that Anderson would not appear on the 10th because he was in trial. Seafood City's counsel went to the courthouse and learned that the jury had rendered its verdict in the trial. Anderson's counsel told him that Anderson would not appear for the examination the next day. At the courthouse at 3:30 p.m., Seafood City's counsel handed Anderson's counsel a notice of intent to appear ex parte on December 11.

Motions for terminating sanctions

Seafood City filed a motion for terminating sanctions on December 11, 2014, stating Anderson had still not given any reasons for failing to attend the testing as ordered. In another ex parte application on December 17, 2016, Seafood City stated that Anderson had agreed to an examination by Dr. Lymberis on December 13. In an attached declaration, Dr. Lymberis stated that Anderson appeared for the examination, but although Dr. Lymberis limited her questions about his sexual history to his alleged military sexual trauma or how it affected his claims of PTSD or TBI (in compliance with the court order), Anderson had refused to answer. She therefore could not determine whether he in fact suffered from military sexual trauma and how it might interact with his claims of PTSD and TBI.

At a hearing on December 18, 2014 related to two other discovery motions (regarding securing Anderson's release to

review his medical records and the inspection of his dog), the trial court set the hearing on terminating sanctions for January 5, 2015.

Anderson filed oppositions to both motions for terminating sanctions. In an attached declaration, Anderson stated he had gone to the Veteran's Administration Hospital on November 30 (while the other trial was in progress) to be treated for lower back pain, and had been instructed to arrange a follow-up appointment one week later. He returned to the VA on December 10th for an appointment he had made on December 7. An attached "walk-in note" stated that on December 10, Anderson came into the clinic in a wheelchair for "intermittent episodes of flare-ups and spasm." The nurse refilled his prescriptions and gave him a heating pad. In another declaration, Anderson stated that he had not refused to answer any questions by Dr. Lymberis: "If a question about my sexual history or military sexual trauma incident ('MST') ever seemed too invasive or private I simply asked Dr. Lymberis why such information was being sought. Dr. Lymberis never answered any such inquiries, and just asked a new question, leading me to believe she agreed the question was too intrusive and beyond what this Court said I should answer." He had explained that the MST "occurred in 1984 at an Air Force base in Langley, Virginia, and that it was related to unwanted sexual contact by another serviceperson." As for his TBI and PTSD, he had "informed Dr. Lymberis that I was knocked unconscious and severely injured at a different military

base . . . when I got caught in jet-wash and was thrown over 20 feet through the air into a cement runway barrier while refueling a fighter jet." Seafood City filed a reply.

At the hearing on January 5, 2015, the court first addressed Anderson's objection to releasing his medical records and deferred a ruling. As for the service dog inspection, the court tentatively stated that Seafood City ought to be able to do an appropriate examination.

The court then noted that a Facebook post by Anderson (submitted by Seafood City) showed a photo of him waiting for the doctor's appointment which he attended on December 10 rather than appearing for the scheduled examination by Dr. Hoppe. Anderson's attorney characterized the appointment as an emergency visit for Anderson's back, and said Anderson had been lying down and using a wheelchair during the other trial.

The court then noted that it had limited Dr. Lymberis's inquiry in its order, she had attempted to comply, and Anderson had refused to answer. The court asked Anderson's counsel, "Don't you think [the] defense is entitled to weed out what is and what isn't part of the trauma that occurred to exposure to trauma at the store?" When counsel responded, "No, your honor," the court replied, "[W]hat is happening here . . . is that you and your client are basically thumbing your nose at the defense theory and the court's authority to order the plaintiff to comply with what . . . in my view is reasonable inquiry regarding what the damages are in this case. [¶] [Anderson] didn't have to open the door

at his deposition to this. He did." Noting the undue consumption of time, the court stated it was tempted to impose terminating sanctions: "I'm going to take it under submission, but I'm telling you, . . . your attitude is imperious in the sense that you do not care for the defendants' theories and right to pursue their theories to the extent that I think you've violated multiple court orders and created all this litigation." The court was attempting to manage "the civil procedure of this case" to allow defendants to have a fair trial, and "when Hoppe's examination didn't take place, the Lymberis examination was disrupted because she couldn't follow-up on whatever the testing results might have been and now they're facing a trial date in two days with . . . inadequate preparation. So they've been ham-strung."

The court commented that the examination of the service dog had been delayed by "silly and meritless" arguments, and Anderson had not complied with a reasonable record request. "[H]ow can they possibly defend themselves without V.A. records, without examination of the service animal, without a full and complete psychological examination? And all of that is really due to Mr. Anderson's refusal to really comply with the . . . court order." The trial court stated, "[A]t this point [Anderson] has no credibility with me. I think games have been played in this case to gain an advantage which has resulted in advantage to Mr. Anderson over to the prejudice of the defendants because they are not ready for a trial on the very central

issue, which is your claim for damages, which is what the case is all about, a claim for compensation for damages. [¶] [I]t's completely not credible to me that Mr. Anderson, who gets a verdict at 3:30 on day one, the next day at 10:30 could not get to the doctor's office." And there was no evidence of back pain or disability sufficient to prevent his attendance. Anderson had no evidence of emergency medical needs or any other evidence to back up his arguments. Monetary sanctions would not be adequate, and evidence sanctions were not on the table.

The trial court took the motions under submission, vacating the January 7 trial date.

Order granting motion for terminating sanctions

On January 7, 2015, the trial court filed a 22-page order granting both of Seafood City's motions for terminating sanctions, concluding that Anderson "has willfully violated the court orders relative to the Hoppe and Lymberis mental examinations and that the violation was without substantial justification and caused prejudice to the defendants." All other pending motions were moot. The order noted that Seafood City had cited specific facts showing that Anderson was claiming ongoing emotion distress from the alleged discrimination, and the trial court had balanced Seafood City's discovery rights and Anderson's right to privacy in its detailed order allowing the mental examinations. The evidence submitted proved that Anderson willfully failed to appear for the Hoppe examination on December 10, thus disrupting the Lymberis

examination. "There was simply no justification for Plaintiff to disobey this court's 12/3/14 order." "Plaintiff's Facebook post, made at approximately 3:30 p.m. [December 10], reflects a picture of Plaintiff smiling broadly with the caption, 'VA waiting game for Dr.'s appointment.' No explanation has been provided as to why he could not have delayed his appointment or attended Hoppe's testing earlier in the day." Anderson "has been willfully disobedient to the court's prior order in order to disrupt the trial preparation of Defendants . . . ."

The second motion for terminating sanctions was additional support for terminating sanctions. Anderson appeared for his examination with Dr. Lymberis but refused to answer her questions about his alleged MST or how it affected his claims of PTSD and TBI. Dr. Lymberis's declaration demonstrated this refusal, which was a purposeful violation of the court's orders. Anderson's conduct was "part of a pattern of refusals to comply with discovery and court orders that were directed to determining the contribution of pre-existing mental conditions to the damages claimed in the litigation." Although a related motion to compel was now moot, Anderson also refused to reasonably cooperate in providing a release so the defense could obtain records from the V.A. regarding "treatment for pre-existing conditions, the need for the service dog, and the contribution of pre-existing conditions to the claim for damages." The court issued an order of terminating sanctions and ordered the matter dismissed.

Motion for reconsideration

On January 22, 2015, Anderson filed a motion for reconsideration. Counsel's declaration stated that the transcript of the December 3 hearing did not match the court's order, and that counsel never simply agreed that Anderson would appear at the testing on December 10. Anderson's declaration stated that at home after trial ended on December 9, his back pain was so severe that he was unable to get to the bathroom, and on December 10 "it was impossible to go for testing . . . because I had trouble even getting out of bed to go to the VA." In his December 13 exam, he had refused to answer Dr. Lymberis only when she disregarded the court's order and asked invasive questions about his sexual history. Anderson's expert Dr. Ho filed a declaration stating that her examination concluded that Anderson was credible, his MST was not related to his present emotional distress, and there was no legitimate reason to probe into his MST.

Seafood City responded that Anderson was attempting to submit additional evidence without explaining why he did not produce it in his previous opposition to the motions. A declaration from Dr. Lymberis stated that during her examination Anderson spontaneously brought up his past and current sexual experiences, and she had never asked him the intrusive questions he described in his declaration. He had refused to answer any questions about the MST.

The trial court issued a tentative ruling denying the motion to reconsider because rather than new facts or law,

the motion relied on different facts previously available to Anderson but not presented to the court. At the hearing on March 13, 2015, Anderson's counsel again represented that the court's testing order did not conform with his notes from the December 3 hearing or what the court said at the hearing. The holidays had delayed his attempts to get the December 3 hearing transcript and Dr. Ho's deposition. Seafood City's counsel argued that Anderson had stonewalled throughout its attempts at discovery, and the minute order was consistent with the court's comments at the December 3 hearing. The trial court denied the motion for reconsideration and adopted its tentative order. In a minute order filed April 21, the court dismissed the case, and counsel for Seafood City gave notice of entry dated April 28, 2015.

Anderson filed an appeal from the order of dismissal "and from all pre-trial orders" on May 6, 2015.

Memorandum of costs and motion to strike costs

Seafood City's memorandum of costs dated October 29, 2015, requested costs totaling $37,142.94. A declaration from counsel stated that on January 29, 2014, Seafood City served on Anderson a Code of Civil Procedure section 998 (section 998) offer of $5,000, and 35 days passed with no response. Anderson responded with a motion to strike the costs memorandum, arguing that the section 998 offer was void and the claimed costs were fraudulent, exorbitant, and unreasonable. Seafood City filed an opposition and Anderson filed a reply. The court denied the motion to strike

in part on July 2, 2015, approving a total of $31,955.68 in costs. Seafood City filed a notice of ruling on July 7. On July 27, 2015, Anderson filed a notice of appeal from the order denying the motion to strike costs "and from all pre-trial orders of the superior Court."

A judgment filed August 19, 2015, stated that the action had been dismissed in its entirety, entered judgment in favor of Seafood City, and awarded $31,966.68[2] in costs to Seafood City.

DISCUSSION

I. The appeal is properly before us.

Seafood City argues that Anderson's appeal must be dismissed because the order granting the motion for terminating sanctions is not an appealable order. "An order granting terminating sanctions is not appealable, and the losing party must await the entry of the order of dismissal or judgment *unless* the terminating order is inextricably intertwined with another, appealable order." (*Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 940.) After the court denied Anderson's motion to reconsider and entered an order of dismissal in April 2015, Anderson timely filed the first notice of appeal on May 6. He filed his second notice of appeal in late July, three weeks after the trial court denied his motion to strike costs and determined the cost amounts,

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[2] The judgment makes an error in addition. The stated costs are $7,137.95 for deposition costs, $1,092.73 for service of process fees, and $23,725 for expert witness fees, for a total of $31,955.68.

and three weeks before entry of judgment. The second notice of appeal is premature but valid. "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(1).) Further, "[t]he reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." (Rule 8.104(d)(2).) Anderson's appeal is properly before us.

2. The order granting Seafood City's motion for terminating sanctions was not an abuse of discretion.

Code of Civil Procedure section 2023.030, subdivision (d)(3), allows the trial court (after notice and a hearing) to impose a terminating sanction in the form of an order dismissing the action, on a party misusing the discovery process. Code of Civil Procedure section 2032.410 provides that if a party is required to submit to a mental examination "but fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including . . . a terminating sanction."

Here, the trial court imposed a terminating sanction after Anderson violated its order requiring him to submit to a mental examination. "We accept the trial court's factual determinations concerning misconduct if they are supported by substantial evidence. [Citation.] We review the order to issue a terminating sanction based on those factual findings for abuse of discretion." (*Osborne v. Todd Farm Service*

(2016) 247 Cal.App.4th 43, 51 (*Osborne*).) In deciding whether the trial court abused its discretion, we view the entire record in the light most favorable to the trial court's order, and " 'also defer to the trial court's credibility determinations. [Citation.] The trial court's decision will be reversed only "for manifest abuse exceeding the bounds of reason." ' " (*Ibid.*) "The question 'is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose.' " (*Id.* at p. 54.)

Anderson contends the trial court abused its discretion when it ordered the examinations in the first place. "Generally, discovery orders are not appealable." (*City of Woodlake v. Tulare County Grand Jury* (2011) 197 Cal.App.4th 1293, 1299.) We therefore do not consider this argument, nor Anderson's argument that the examinations should have been recorded by audio equipment. We note, however, that a court properly orders mental examinations when a plaintiff (as does Anderson) claims continuing emotional distress, which also raises the question of preexisting mental conditions which may be an alternative source for the distress. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1885.) Further, although Code of Civil Procedure section 2032.530, subdivision (a) gives the examiner and examinee the right to audio recording, such recording is allowed, not mandatory, and Anderson never requested it. (See *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 271.)

Anderson contends that the dismissal of his case was an abuse of discretion because the trial court did not impose lesser sanctions, characterizing his failure to attend the Hoppe examination as "he was just late." This mischaracterizes the evidence, which we view in the light most favorable to the order. Anderson failed to appear for Dr. Hoppe's examination on December 10. At the hearing on January 5, counsel represented that Anderson's visit to the doctor on December 10 was an emergency visit, but the evidence did not support that claim (and Anderson's Facebook photo belied it). Nothing in the record supports a claim that Anderson was merely late to the appointment or ever met with Dr. Hoppe at a later date. The trial court had ample support in the evidence for its conclusion that Anderson willfully failed to appear in clear violation of the order.

Anderson also contends that the trial court could not reasonably accept Dr. Lymberis's description of his failure to answer her questions regarding the MST and distrust Anderson's account. The trial court explicitly stated it did not believe Anderson, and we defer to the court's credibility determination. (*Osborne*, *supra*, 247 Cal.App.4th at p. 251.) The trial court was entitled to believe Dr. Lymberis's statement that Anderson refused to answer questions which complied with the trial court's order.

The record amply supports the trial court's conclusion that Anderson had made repeated, and successful, efforts to thwart discovery by Seafood City, including clear violations

of the trial court's order for examinations by Dr. Hoppe and Dr. Lymberis. At the time of the hearing on the motion for terminating sanctions—two days before the scheduled trial—Anderson's counsel continued to assert that Seafood City was not entitled to discovery to separate out what part of Anderson's claimed trauma was due to the alleged incidents at the grocery store. Further, Anderson had blocked efforts to provide his medical records and had made what the court called meritless arguments to delay the examination of the service dog at the center of his dispute with Seafood City.

The trial court did not act outside the bounds of reason when it granted Seafood City's motion for terminating sanctions. "A party who is unwilling to, or whose counsel is incapable of, performing the obligations of litigation with diligence should not be surprised when the right to proceed is lost." (*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1069.)

3. The denial of Anderson's motion for reconsideration was not an abuse of discretion.

A motion for reconsideration under section 1008 "must be based on new or different facts, circumstances or law [citation], and facts of which the party seeking reconsideration was aware of at the time of the original ruling are not 'new or different.' [Citation.] In addition, a party must provide a satisfactory explanation for failing to offer the evidence in the first instance." (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.) We review the

trial court's denial of Anderson's motion for reconsideration for an abuse of discretion. (*Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.)

We agree with the trial court that Anderson did not present "new or different facts" in his motion for reconsideration and did not satisfactorily explain why he did not offer what he calls new evidence in the first place. He points to a doctor's letter dated January 16 stating that his visit on December 10 was an emergency, but his only reason for not offering such a letter in time for the January 5 hearing is that he had to wait until after the holidays, and in any event the letter is inconsistent with the evidence he did submit at the January 5 hearing which showed that the visit was a follow-up. In his opening brief, he repeatedly claims that after the holidays he finally was able to get a copy of the "mental exam reporter's transcript," by which he apparently means the reporter's transcript of the December 3 hearing, and that the transcript shows that he did not agree to an examination by Dr. Hoppe on December 10. This is not supported by a review of the transcript, which clearly shows that counsel agreed to an examination on December 10, at 10:30 a.m. Further, the trial court pointed out that the transcript had indeed been available for review. Anderson did not give reasonable explanations for his failure to produce this "new" evidence at the time of the hearing on the motion for terminating sanctions, and the trial court did not abuse its discretion in denying his motion for reconsideration.

4. The denial in part of Anderson's motion to strike costs was not an abuse of discretion.

"Generally, a trial court's determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for an abuse of discretion." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) We will reverse an order granting or denying a motion to tax costs only when the trial court's action is arbitrary, capricious, or exceeds the bounds of all reason under the circumstances. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249–1250.)

Anderson has failed to carry his burden to show that the trial court's award of $7,137.95 in deposition costs was outside the bounds of reason. He points to his counsel's declaration that other court reporters were cheaper, and to a 20-year-old case giving lower per-page costs for transcripts. The contention that an alternative reporter would have been less costly " ' "is not controlling. The only requirements in this respect are that the cost be actually incurred and that it be reasonable. [Citation.] What is reasonable presents a question of fact." ' " (*Johnson v. Worker's Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 243.)

Anderson also claims it was error to award any expert witness fees, because Seafood City's section 998 settlement offer of $5,000, made in January of 2014, was unreasonable. An offer under section 998 must be in good faith, which "in turn requires that the settlement offer be 'realistically reasonable under the circumstances of the particular case,' " so that the offer carries some reasonable prospect of

acceptance. (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483.) "Whether a section 998 offer was reasonable and made in good faith is left to 'the sound discretion of the trial court.' " We reverse "only if . . . in light of all the evidence viewed most favorably in support of the trial court, no judge could have reasonably reached a similar result." (*Id.* at p. 1484.) "[A] reasonable section 998 settlement offer is one that 'represents a reasonable prediction of the amount of money, if any, [Seafood City] would have to pay [Anderson] following a trial, discounted by an appropriate factor for receipt of money by [Anderson] before trial.' [Citation.] The reasonableness of a defendant's section 998 settlement offer is evaluated in light of 'what the offeree knows or does not know at the time the offer is made,' along with what the offeror knew or should have known about facts bearing on the offer's reasonableness. [Citation.] In other words, for a section 998 offer to be reasonable, the defendant must reasonably believe that the plaintiff might accept his offer, and the plaintiff must have access to the facts that influenced the defendant's determination that the offer was reasonable." (*Id.* at p. 1485.)

Seafood City 's offer to compromise pursuant to section 998, served on Anderson on January 29, 2014, offered $5,000 for a dismissal with prejudice, "inclusive of reasonable attorneys' fees and taxable costs that [Anderson] has incurred in investigating and prosecuting this action up and through January 29, 2014." In support of the motion to strike costs, Anderson submitted a declaration from counsel

stating that $5,000 was not a reasonable prediction of how much Seafood City would have to pay following a trial, as if Anderson prevailed he would be entitled to minimum damages for each refusal to admit him to each of two supermarkets, and all attorney fees and costs.[3] He also pointed to Anderson's large jury award against a different supermarket chain (after the trial he was engaged in during the discovery dispute in this case), large recoveries in other service dog cases, and his claim for an injunction. Anderson's former counsel stated that at the time he received the $5,000 offer, he had received responses to interrogatories in which Seafood City merely stated that its investigation was ongoing and it would supplement its response at a later time. There had been no depositions taken or noticed, and he still believed Anderson had a good chance of prevailing at trial.

In opposition, Seafood City argued that the complaint alleged that Anderson entered its supermarket and was asked to leave in October 2011, almost 22 months before he filed his case. Counsel for Anderson had refused to provide any more information, and not until months after the time of the section 998 offer of $5,000 did Seafood City learn

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[3] Anderson cited Civil Code section 52, which provides that a defendant who discriminates in violation of section 51 and section 51.5 is liable for actual damages and any amount awarded by a factfinder up to treble damages, "but in no case less than four thousand dollars ($4,000) and any attorney's fees that may be determined by the court."

Anderson would allege he entered three different stores in 2011, 2012, and 2013. At the time it made its offer, Seafood City had a good faith belief that Anderson's claims were meritless. A declaration by defense counsel stated that after a case management conference on January 22, 2014, she asked Anderson's counsel for additional information regarding Anderson's claims (including whether he entered multiple stores or any store more than once) and he declined to divulge any information beyond what was in the complaint. She thereafter authorized the $5,000 offer.

A declaration by another defense counsel stated that he and other defense counsel monitored Anderson's other trial in December 2014, and he was aware that counsel for the defense in that case had stipulated to liability, which included perjury by defendants' employees and admission of evidence of prior bad acts regarding service dogs.

In reply, Anderson submitted two declarations by counsel to which the trial court sustained evidentiary objections by the defense. Anderson does not challenge the evidentiary rulings and we do not consider the declarations.

On July 2, 2015, the trial court denied Anderson's motion to strike and awarded the bulk of Seafood City's costs.

" 'Even a modest or "token" offer may be reasonable if an action is completely lacking in merit.' [Citation.] 'When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative

purpose of section 998 for the defendant to make a modest settlement offer. If the offer is refused, it is also consistent with the legislative intent for the defendant to engage the services of experts to assist him in establishing that he is not liable to the plaintiff. It is also consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred.' " (*Bates v. Presbyterian Intercommunity Hospital, Inc.* (2012) 204 Cal.App.4th 210, 220.) When the judgment is more favorable to defendant than the offer, the judgment is prima facie evidence that the offer was reasonable. (*Id.* at p. 221.)

The trial court's dismissal resulted in zero liability for Seafood City. While an award of zero damages is generally prima facie evidence that a section 998 offer was reasonable, under the circumstances of this case the dismissal was not on the merits but was instead a terminating sanction for Anderson's defiance of the trial court's discovery order. Nevertheless, the burden was on Anderson to establish that the section 998 offer was unreasonable, or not in good faith. He presented little evidence regarding Seafood City's understanding, or his own, regarding the merits of his case at the time the offer was made in January 2014. Because he failed to cooperate with any of the discovery requests, even on the eve of trial, there was little or no evidence regarding the strength of his case or the amount of injury attributable to any acts by Seafood City. His later damages award in a different case against different defendants, coming nearly a

year after the section 998 offer, is irrelevant to what Seafood City reasonably believed were the merits of his case in January 2014. It is Seafood City's good faith, not Anderson's, that was in issue. Anderson does not argue that he was not in possession of the facts that influenced Seafood City to think an offer of $5000 was reasonable for what it then believed was alleged to be acts by a single supermarket.

Viewing the evidence in the light most favorable to the trial court's order, we conclude it was not an abuse of discretion to award to Seafood City the cost of expert witnesses.[4] Anderson has not shown that no judge could reasonably have reached the same result.

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[4] We note that Seafood City's respondent's brief is of little help in responding to the section 998 issue, containing no citations to the record and little discussion. We also note that the brief fails to include the required table of authorities, in violation of California Rules of Court, rule 8.204(a)(1)(A). We therefore decline to award costs on appeal to Seafood City.

DISPOSITION

The judgment is ordered amended to reflect a total of $31,955.68 in costs. As so amended, the judgment is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.